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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MOSES CRUZ, Defendant and Appellant .	B250505 (Los Angeles County Super. Ct. Nos. BA399973 & GA088482)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael D. Carter, Judge. Affirmed.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Moses Cruz was convicted in separate cases of battery on a police officer, and assault by means of force likely to produce great bodily injury. (Pen. Code, §§ 243, subd. (c)(2); 245, subd. (a)(4)).)[1] The trial court sentenced Cruz to an aggregate sentence of 3 years and 8 months in state prison. Further, the trial court ordered lifetime sexual offender registration pursuant to its discretionary authority under section 290.006. Cruz's sole contention on appeal is that the trial court lacked authority to order registration. Cruz argues the jury failed to find facts supporting the registration order and thus, the order was an improper increase in penalty for his offense under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). We affirm the judgment.

FACTS

On August 29, 2012, Cruz pled no contest in case number BA399973 to battery on a police officer. (§ 243, subd. (c)(2).) Pursuant to a negotiated plea agreement, the trial court suspended imposition of sentence and placed Cruz on probation for three years on condition he serve one year in county jail.

On December 26, 2012, Cruz followed M.A. into a women's restroom at a market. When M.A. exited her stall, she noticed Cruz in the restroom. He put a finger to his lips, indicating that M.A. should remain silent. He then grabbed M.A. by the neck with one hand, pushed her against the back wall of a stall, and attempted to cover her mouth with his other hand. A struggle ensued, and Cruz gripped M.A.'s neck tighter. Store employees heard M.A.'s screams and the sounds of a struggle. An employee entered the restroom to investigate, at which point Cruz released M.A. and tried to leave the restroom while zipping up his pants. Three store employees struggled with Cruz for a brief time before restraining him. M.A. appeared shaken and scared. She reported to one of the employees, "I think he tried to rape me."

Pasadena police officer Salvador Vidales took Cruz into custody. He had scratches on his cheek and arm; his zipper was down. Cruz repeatedly said, "I didn't rape her, I didn't rape her." At the police station, Cruz said that he had exited the men's

[1] All section references are to the Penal Code unless otherwise specified.

restroom and bumped into M.A. He said he did not know how he got scratches on his hands and face; he said he did not know why his zipper had been open.[2] Pasadena Police Department Detective Mark Lang escorted Cruz to a holding cell. In the cell, Cruz told the detective, "I did not rape her. I asked her to suck my dick."

M.A. was examined at a local hospital. The examining doctor found that M.A. had a slight straightening of the spine, possibly resulting from a neck spasm. M.A. suffered pain in her abdomen, neck and head for about two weeks after the incident.

In March 2013, the People filed an information in case number GA088482 charging Cruz with assault with intent to commit rape or sodomy or oral copulation in violation of sections 264.2, 288 and 289 (count 1; § 220, subd. (a)(1)) and assault by means of force likely to cause great bodily injury (count 2; § 245, subd. (a)(4)).
The charges were tried to a jury in May 2013. The prosecution presented evidence establishing the facts summarized above. Cruz did not present any defense evidence; his trial counsel conceded an assault had occurred, but challenged the sufficiency of the evidence supporting the count that Cruz had intended to commit a felony sex crime.
On May 23, 2013, the jury returned verdicts finding Cruz not guilty of assault with intent to commit felony sex crimes as charged in count 1, not guilty of simple assault as a lesser offense of count 1, and guilty of assault by means of force likely to produce great bodily injury as charged in count 2.

On June 12, 2013, the trial court sentenced Cruz to a mid-term of three years on his conviction for the assault by means of force likely to produce great bodily injury, and ordered lifetime sexual offender registration in case number GA088482. In case number BA399973, the court terminated Cruz's probation, and sentenced him to a consecutive term on this battery conviction of one-third the mid-term of two years, i.e., eight months. The trial court also imposed a lifetime sex offender registration requirement. In doing so, the trial court found the offense was committed as a result of a sexual compulsion or for the purpose of sexual gratification, citing to evidence presented at trial. The trial court

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[2] In other comments at the police station, Cruz suggested he had been "dreaming" he was at a party, and dreamt he had entered a bathroom "trying to get laid."

further found a lifetime registration to be appropriate because Cruz was a "predator," who planned the assault and chose his victim when she was vulnerable. Cruz appealed.

DISCUSSION

We appointed counsel to represent Cruz on appeal. Appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, requesting that we review the record on appeal for arguable issues.[3] Upon review of the entire record, we requested further briefing on the following issue: "Does the discretionary imposition of lifetime sex offender registration pursuant to Penal Code section 290.006 increase the 'penalty' for an offense within the meaning of *Apprendi v. New Jersey* (2000) 530 U.S. 466, and require that the facts supporting the trial court's imposition of the registration requirement be found true by a jury beyond a reasonable doubt? (See e.g., *People v. Mosley* (2010) 188 Cal.App.4th 1090 [(*Mosley*)], review granted Jan. 26, 2011, S187965[.)]"

In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. at p. 490.) The term "statutory maximum" was later defined to mean "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely v. Washington* (2004) 542 U.S. 296, 303.)

Section 290 requires anyone convicted of certain specified sex offenses to register as a sex offender. A trial court also has discretion to order registration if someone is convicted of an unspecified offense if it finds the person committed the offense "as a result of sexual compulsion or for purposes of sexual gratification." (§ 290.006.) Sex offender registration has been held not to be a form of punishment under the state or federal Constitution. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1196 (*Hofsheier*).) However, in 2006, voters enacted Jessica's Law, which added to the Penal Code as

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[3] We thereafter notified Cruz by letter that he could submit any claim, argument or issues which he wished us to review. Cruz has not filed any claim of error in our court.

section 3003.5, subdivision (b). Among other things, Jessica's law prohibited registered sex offenders from living within 2000 feet of any school or park "where children regularly gather." (§ 3003.5, subd. (b).) Since then, a number of cases have considered whether the residency restriction under Jessica's law constitutes a penalty "beyond the prescribed statutory maximum" under *Apprendi*, requiring a jury make the findings supporting registration.[4]

Here, the jury found Cruz guilty of assault by means of force likely to produce great bodily harm, and not guilty of assault with intent to commit felony sex crimes. Notwithstanding the jury's acquittal on the sex-related crime, the trial court made the findings necessary to require lifetime sex offender registration, relying on evidence admitted at trial. (*Hofsheier*, *supra*, 37 Cal.4th at p. 1197 [separate statement of reasons required to support discretionary registration orders].) Cruz argues the trial court's findings are irrelevant. According to Cruz, "the Sixth Amendment requires that a jury, not a judge, make the discretionary findings under section 290.006 triggering the registration requirement and the associated residency restrictions." Because the jury acquitted Cruz of the sole sex offense charged against him, Cruz contends the jury would not have found the necessary facts to support a lifetime registration requirement.

We disagree. The factual findings necessary to support a discretionary registration order need not be made by a jury because it is not an additional penalty within the meaning of *Apprendi*. The California Supreme Court concluded that the new residency restrictions are not punitive in *In re E.J.* (2010) 47 Cal.4th 1258, 1278 (*E.J.*). Although *E.J.* addressed a different context, we choose to the follow the Supreme Court's reasoning. In *E.J.*, four registered sex offender parolees became subject to the residency restrictions upon their release from custody. They were each convicted of one or more

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[4] These cases are currently pending before the California Supreme Court on this issue. (*See Mosley, supra,* 188 Cal.App.4th 1090, review granted Jan. 26, 2011, S187965; *People v. Hass,* review granted Mar. 14, 2012, S199833; *In re J.L.* (2010) 190 Cal.App.4th 1394, review granted Mar. 2, 2011, S189721; *In re S.W.,* review granted Jan. 26, 2011, S187897; *In re Taylor* (2012) 209 Cal.App.4th 210, review granted Jan. 3, 2013, S206143.)

sex-related crimes before the passage of Jessica's Law and were released after its effective date. They filed a petition for writ of habeas corpus, contending enforcement of the residency restrictions constituted an impermissible retroactive application of the statute, which also violated the ex post facto clauses of the United States and California Constitutions. (*Id.* at p. 1264.) The high court rejected petitioners' retroactivity and ex post facto claims. In doing so, the court reasoned, "Although they fall under the new restrictions by virtue of their *status* as registered sex offenders who have been released on parole, they are not being 'additionally punished' for commission of the original sex offenses that gave rise to that status. Rather, petitioners are being subjected to new restrictions on where they may reside while on their *current parole*—restrictions clearly intended to operate and protect the public *in the present*, not to serve as additional punishment for past crimes." (*Id.* at p. 1278; see also *People v. Picklesimer* (2010) 48 Cal.4th 330, 344.)

Cruz contends *E.J.* lacks precedential value because "the *E.J.* court did not resolve whether the statutory residency restriction applied to offenders other than parolees, nor whether the residency restriction is a punitive consequence for the sex offense if it is imposed beyond the parole period; i.e., as a *lifetime restriction* automatically accompanying, by operation of law, the lifetime registration requirement." We see no reason to distinguish between parolees and offenders, as offenders only become subject to the restrictions upon their release from custody, whether by parole or probation. The *E.J.* court was clear in holding that the residency restrictions were not additional punishment for past crimes. The court's reasoning in *E.J.* is applicable to this case.

Moreover, the United States Supreme Court has held that when deciding whether to apply *Apprendi* to a particular issue, a consideration is whether it was within the jury's traditional domain. (*Oregon v. Ice* (2009) 555 U.S. 160, 168.) In *Oregon v. Ice*, the court held *Apprendi* does not apply to the decision to impose consecutive sentences on a defendant convicted of multiple offenses, because the "historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently. Rather, the choice rested exclusively with the judge." (*Ibid.*) A decision about whether

to order registration is a determination based upon judicial findings about the nature of the offense and defendant's character. (See *Hofsheier, supra,* 37 Cal.4th at p. 1197.) The assignment to a judge of such a determination does not "implicate[] *Apprendi's* core concern: a legislative attempt to 'remove from the [province of the] jury' the determination of facts that warrant punishment for a specific statutory offense." (*Oregon v. Ice*, at p. 170.) "[A]s *Apprendi's* core concern is inapplicable to the issue at hand, so too is the Sixth Amendment's restriction on judge-found facts." (*Ibid*.)

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.